Office - Supreme Court, U.S.
FILED
JAN 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-761

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ERNEST DONALD SUGGS,
Petitioner

v.

STATE OF ALABAMA,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Joe R. Whatley, Jr.
John C. Falkenberry
Donald W. Stewart

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, AL 35203
(205) 323-8300

No. 81-761

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ERNEST DONALD SUGGS,
Petitioner

v.

STATE OF ALABAMA,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

Respondent has argued that this Court has no jurisdiction based on overly strict interpretation of Rule 39 (k), Alabama Rules of Appellate Procedure, and a footnote in *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). Respondent has misconstrued both Rule 39 (k) and the standard for determining whether this Court has jurisdiction under 28 U.S.C. § 1257.

First, Rule 39 (k), Alabama Rules of Appellate Procedure is not an absolute prohibition against the Supreme Court of Alabama looking to the record for facts not in-

cluded in the opinion of the Alabama Court of Criminal Appeals. The Rule merely states that "[t]he review . . . will *ordinarily* be limited. . . ." (emp. supp.) The Committee Comments to Rule 39 also state that the Rule is not absolute.

> The scope of review is generally that which is now used and with which the Bar is familiar. This includes . . . the rules that in many instances, this court can go to the record for a more complete understanding of those features treated in the opinion of a court of appeals. See cases cited in both the opinion and concurring opinion. *Johnson v. State,* 287 Ala. 576, 253 So. 2d 344, and this action of the court may be ex mero motu, *Wilbanks v. State,* 289 Ala. 171, 266 So.2d 632.

Alabama Rules of Court at 446-47 (1979 Desk Copy). Also, Rule 1, Alabama Rules of Appellate Procedure, states that the Rules "shall be construed so as to assure the just, speedy and inexpensive determination of every appellate proceeding on its merits." To accept respondent's overly strict construct of Rule 39 (k) would deny petitioner a just determination on the merits.

Furthermore, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York,* 394 U.S. 576, 583 (1969). In *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928), quoted in *Street v. New York, supra* at 584, this Court described the proper standard for determining whether a federal question has been properly raised as follows:

> No particular form of words or phrases is essential, but only that the claim . . . and the ground therefor be brought to the attention of the state court with fair precision and in due time.

Petitioner briefed the issue of the constitutionality of the portion of the jury charge on self-defense to the Alabama Supreme Court. In fact, most of the first full paragraph on page five of the petition for certiorari is taken verbatim from a paragraph on page 40 of petitioner's brief to the Alabama Supreme Court. Petitioner has brought the federal question to the attention of the state court with fair precision and in due time.

II. THE TRIAL COURT'S JURY INSTRUCTION COULD HAVE LEFT THE IMPRESSION THAT THE BURDEN OF PERSUASION ON THE ISSUE OF SELF-DEFENSE IS ON THE PETITIONER

Based on *Howard v. State,* 390 So.2d 1070 (Ala. Cr. App.) *writ denied* 390 So.2d 1077 (Ala. 1980) and the cases cited therein, the law in Alabama, as in Georgia, is that once a defendant presents evidence on the issue of self defense, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, *Holloway v. McElroy,* 632 F.2d 605 (5th Cir. 1980), *cert. denied,* ..... U.S. ....., 49 U.S.L.W. 3881 (1981) applies in Alabama, just as it does in Georgia.

However, *Howard* and the cases cited therein indicate an ambivalence about the burden of proof on self-defense: they say that the burden is on the State to prove beyond a reasonable doubt that a defendant did not act in self-defense, but they also say that the trial court cannot tell this to the jury in plain terms. It is this ambivalence which leads a Trial Court to say to the jury that "it is never presumed that an unlawful homicide is committed in the right of self-defense. . . ." (App. 14), and this ambivalence can lead a jury to conclude that the burden is on the defendant. Of course, the Trial Court decides whether an issue goes to the

jury. Once the Court allows the issue of self-defense to go to the jury, it must say in plain and unambivalent terms that the burden of proof on the issue of self-defense is on the State. Otherwise, as described in *Holloway*, the defendant's right to due process is violated.

Respectfully submitted,

Joe R. Whatley, Jr.
John C. Falkenberry
Donald W. Stewart

STEWART, FALKENBERRY & WHATLEY
2017 Morris Avenue
Birmingham, AL 35203